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U.S. Treatment of Prisoners in Iraq: Selected Legal Issues

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U.S. Treatment of Prisoners in Iraq: Selected Legal Issues

Summary

Photographs depicting the apparent abuse of Iraqi detainees at the hands of U.S. military personnel at Abu Ghraib prison in Iraq resulted in numerous investigations, congressional hearings, and prosecutions, raising questions regarding the applicable law. The international law of armed conflict, in particular, those parts relating to belligerent occupation, applies in Iraq. The four Geneva Conventions of 1949 related to the treatment of prisoners of war (POW) and civilian detainees, as well as the Hague Regulations define the status of detainees and state responsibility for their treatment. Other international law relevant to human rights and to the treatment of prisoners may also apply. For example, the International Covenant on Civil and Political Rights prohibits “cruel, inhuman or degrading treatment.” The U.N. Declaration on Human Rights and the U.N. Convention Against Torture (CAT) is also relevant. Federal statutes that implement the relevant international law, such as the War Crimes Act of 1996 and the Torture Victim Protection Act, as well as other criminal statutes with extraterritorial application may also come into play. Finally, the law of Iraq as amended by regulations that were issued by the Coalition Provisional Authority (CPA) may apply in some circumstances.

This report summarizes pertinent provisions of the Geneva Conventions Relative to the Treatment of Victims of War (Geneva Conventions) and other relevant international agreements. The report begins with a discussion of international and U.S. standards pertaining to the treatment of prisoners. A discussion of accountability in case of breach of these standards follows, including potential means of asserting jurisdiction over alleged violators, either in military courts under the Uniform Code of Military Justice (UCMJ) or U.S. federal courts, by applying U.S. criminal statutes that explicitly apply extraterritorially or within the special maritime or territorial jurisdiction of the United States (as defined in 18 U.S.C. § 7), or by means of the Military Extraterritorial Jurisdiction Act (MEJA). The section that follows discusses international requirements to provide redress for those whose treatment at the hands of U.S. officials may have fallen below the standards outlined in the first section of the report. Finally, the report summarizes relevant congressional activity during the 108th and 109th Congresses, including a brief discussion of the anti-torture provision of P.L. 109-13 (H.R. 1268) as well as relevant pending legislation (H.R. 3003, S. 12, H.R. 112, H.R. 2863, S. 1042). This report will be updated.

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U.S. Treatment of Prisoners in Iraq: Selected Legal Issues

The Army report charging that U.S. Military Police and other personnel, including civilian contractor personnel, abused Iraqi prisoners held under the authority of the Coalition Provisional Authority (CPA) has given rise to questions regarding the applicable law. The report¹ was the result of an Army investigation initiated after a soldier turned over to military law enforcers photographs depicting U.S. military personnel subjecting Iraqi detainees to treatment that has been described as degrading, inhumane, and in some cases, tantamount to torture. A report by the International Committee of the Red Cross (ICRC) relating to the treatment of prisoners by U.S. forces was also made public.² The results of several investigations initiated by the Department of Defense (DOD) have been presented to Congress.³ Congress included several measures in the National Defense Authorization Act for FY2005, P.L. 108-375, to address the treatment of detainees and jurisdiction over persons responsible for their abuse. As new allegations of prisoner maltreatment continue to surface, congressional interest in the matter is not likely to diminish any time soon.

This report summarizes pertinent provisions of the four 1949 Geneva Conventions Relative to the Treatment of Victims of War (collectively known as “the Geneva Conventions”) and other international agreements concerning the treatment of certain types of prisoners. The report begins with a discussion of international and U.S. standards regarding the treatment of prisoners. A discussion of accountability in case of breach of these standards follows, including potential means of asserting jurisdiction over alleged violators, either in military courts or U.S. federal courts. The report then discusses international requirements and U.S. procedures to provide

¹ Lt. General Ricardo Sanchez, the senior U.S. Commander in Iraq, requested U.S. Central Command (CENTCOM) to conduct an investigation. Major General Antonio M. Taguba was appointed to conduct an investigation into the 800th MP Brigade’s detention and internment operations at the Abu Ghraib prison in Baghdad. General Taguba’s report was issued on February 26, 2004, but was not made publicly available until graphic photos depicting U.S. soldiers abusing Iraqi prisoners were shown on *60 Minutes II*, April 28, 2004. A redacted version of the Taguba Report is available at [<http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>].

² Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb. 2004), *available at* [<http://www.cbsnews.com/htdocs/pdf/redcrossabuse.pdf>] [hereinafter “ICRC Report”].

³ The Department of Defense (DOD) website has links to reports as well as other information regarding the investigations and prosecutions at [http://www.defenselink.mil/news/detainee_investigations.html].

redress for those whose treatment at the hands of U.S. officials may have fallen below the standards outlined in the first section of the report. Finally, the report summarizes relevant congressional activity to date.

International Law Protecting Prisoners

The international law of armed conflict, in particular, those parts relating to belligerent occupation, applies in Iraq.⁴ The four Geneva Conventions of 1949⁵ and the Hague Regulations⁶ play an important role. Other international law relevant to human rights and to the treatment of prisoners may also apply. For example, the International Covenant on Civil and Political Rights prohibits “cruel, inhuman or degrading treatment.”⁷ The Convention Against Torture (CAT) is also relevant.⁸

Protection of Prisoners under the Geneva Conventions of 1949

The purpose of the four Geneva Conventions of 1949 is to mitigate the harmful effects of war on all persons who find themselves in the hands of a belligerent party. Each of the conventions provides specific protections for a defined category of persons who are not, or are no longer, taking part in hostilities, including those who are detained for any reason. Whatever status a particular detainee may be assigned, the Geneva Conventions prohibit torture and inhumane or degrading treatment in all circumstances, including for purposes of interrogation.

Prisoners of War (POW). POW status under the third Geneva Convention (“GPW”) offers the highest level of protection, including the right to be tried by court martial (or national court, if a soldier of the Detaining Power could be tried that way) if accused of a crime. In case of doubt as to whether a particular captive is entitled to POW status, the Detaining Power must treat the detainee as a POW until a competent tribunal determines the status of the individual. (GPW Article 5).

⁴ For a description of law currently applicable in Iraq, see CRS Report RS21820, *Iraq: Transition to Sovereignty*, by Kenneth Katzman and Jennifer Elsea.

⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 [hereinafter “GPW”]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516 [hereinafter “GC”], (entered into force Oct. 21, 1950). Both the United States and Iraq are parties to the Conventions.

⁶ Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 (hereinafter “Hague Regulations”).

⁷ See International Covenant on Civil and Political Rights, art. 7, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR].

⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113, *reprinted in* 23 I.L.M. 1027 (1984) and 24 I.L.M. 535 (1985) (entered into force June 26, 1987) [hereinafter “CAT”].

Article 13, GPW, provides that “prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.” Article 14 states that prisoners of war “are entitled in all circumstances to respect for their persons and their honor.” Article 17 states that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” Interrogators are permitted to ask questions, but POWs are required to divulge only their name and limited identifying information. Tactics such as trickery or promises of improved living conditions are not foreclosed.⁹

Civilians Detainees. Civilians who inhabit occupied territory are “protected persons” under the fourth Geneva Convention (“GC”),¹⁰ and are entitled under article 27 “in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs.” While an occupying power is permitted to “take such measures of control and security in regard to protected persons as may be necessary as a result of the war,” Article 27 provides further that “[t]hey shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.” Article 32 forbids any “measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. . .

⁹ See HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 108 (1979). For a more detailed discussion of interrogation methods, see CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer K. Elsea.

¹⁰ Persons with enemy nationality who are not eligible for POW status or other protected status under any of the Conventions and who are detained by a belligerent on its own territory, or presumably elsewhere, are also “protected persons,” unless their state of nationality is not a party to the Conventions. While nationals of a neutral state held in the territory of a belligerent state are “protected persons” only if there are no diplomatic relations between those two states, there is some debate as to whether nationals of neutral states captured in occupied territory are protected. GC art. 4 states in relevant part:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State *who find themselves in the territory of a belligerent State*, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. (Emphasis added).

Such persons are, however, clearly entitled to the assistance of a “Protective Power” or the ICRC. GC art. 11.

The articles in Part II (GC arts. 13-26) cover “the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion. . . .” GC art. 13.

[including] not only . . . murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents.”

Civilians may be detained or interned by an occupying power only if “security requirements make such a course absolutely necessary.” (GC art. 42). Internment or assigned residence is the most severe measure allowed in the cases of protected civilians who pose a definite security threat (GC art. 41(1)), and these measures are to be reviewed by a court or administrative board at least twice annually. (GC art. 43). Article 31 provides that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”

Protected civilians may be imprisoned as a punitive measure only after a regular trial, subject to the protections in articles 64 through 77. Additionally, article 33 provides that “[c]ivilians may not be punished for an offence he or she has not personally committed,” and prohibits all forms of collective penalties and intimidation.

There is also a prohibition against removing protected persons from occupied territory. GC art. 49 states:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

There is an exception that allows the temporary evacuation of an area when absolutely necessary for the security of the population or for imperative reasons of military necessity. However, evacuees are not to be transported outside the occupied territory unless such a measure is unavoidable. Under GC art. 147, the “unlawful deportation or transfer or unlawful confinement of a protected person” is a “grave breach” of the convention. It may also be permissible to relocate persons outside of the occupied territory when it is to their benefit. GC art. 132 allows parties to the Geneva Conventions to “conclude agreements for the . . . accommodation in a neutral country . . . certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.”

A report that the U.S. Central Intelligence Agency transferred certain detainees outside of Iraq for interrogation purposes has brought some accusations that the United States is in breach of international law.¹¹ The Administration reportedly relies for legal support on a draft opinion from the Justice Department’s Office of Legal Counsel (OLC) construing the prohibition as applying to the expulsion from Iraq of persons who have a lawful right to be there, but not to the deportation of illegal aliens in accordance with local law or the temporary removal of persons who have not been

¹¹ Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004 at A01.

charged with a crime to undergo interrogation at some location outside Iraq.¹² Regarding the crux of GC art. 49 as a prohibition on the “forceful uprooting of residents from their homes,”¹³ the OLC memorandum concludes that the temporary transfer abroad of protected persons is not among the historical wartime practices GC art. 49 was intended to alleviate. Thus, it concludes that the relocation of protected persons for a “brief but not indefinite” period is permissible so long as the transferee has not been charged with any offense, but that the treaty’s other protections would continue to apply.

Other Detainees. Some argue that “unlawful combatants” are neither entitled to POW status nor civilian rights under the Geneva Conventions.¹⁴ The Department of Defense has not determined, however, that any of the detainees in Iraq are “unlawful combatants.”¹⁵ Others assert that persons who commit hostile acts but are not entitled to POW status have the status of civilians.¹⁶ The Department of Defense maintains that the Geneva Conventions have applied in Iraq since the onset of combat operations,¹⁷ unlike in Afghanistan, apparently indicating that insurgents in Iraq are treated as protected civilians under the GC rather than as “unlawful combatants.”¹⁸ However, the Administration had earlier determined that the Taliban were covered by the Geneva Conventions, but were nonetheless not entitled to status as POWs or protected persons because they failed to meet the standards for POW treatment under GPW art. 4.¹⁹ Some observers have argued that this apparent

¹² Draft Memorandum from Jack Goldsmith, Assistant Attorney General, U.S. Dept. of Justice, to Alberto R. Gonzales, Counsel to the President, *Permissibility of Relocating Certain “Protected Persons” From Occupied Iraq*, March 19, 2004, available at [http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf] (last visited Oct. 29, 2004).

¹³ *See id*

¹⁴ For an explanation of the “unlawful combatant” issue, see CRS Report RL31367, *Treatment of ‘Battlefield Detainees’ in the War on Terrorism*, by Jennifer Elsea.

¹⁵ *See* Eric Schmitt and Douglas Jehl, *M.P.’s Received Orders to Strip Iraqi Detainees*, N.Y. TIMES, May 18, 2004, at A1, A11.

¹⁶ *See* Department of the Army, FM 27-10, The Law of Land Warfare (hereinafter “FM 27-10”) para. 78 (1956) states:

If a person is determined by a competent tribunal, acting in conformity with Article 5, GPW, not to fall within any of the categories listed in Article 4, GPW, he is not entitled to be treated as a prisoner of war. He is, however, a “protected person” within the meaning of Article 4, GC. (*internal citations omitted*).

¹⁷ *See* Defense Department Background Briefing, May 14, 2004, available at [<http://www.defenselink.mil/transcripts/2004/tr20040514-0752.html>].

¹⁸ *Id.* (stating that, “for the most part, . . . the people under U.S. control are security internees who have engaged in or have been suspected of engaging in activities which threaten the security of the state and coalition forces.”). *But see* Douglas Jehl and Neil A. Lewis, *U.S. Disputed Protected Status of Iraq Inmates*, N.Y. TIMES, May 23, 2004 (reporting that U.S. response to ICRC report about prisoner abuse allegedly asserted that many Iraqi prisoners were not entitled to the full protections of the Geneva Conventions).

¹⁹ *See* Eric Schmitt and Douglas Jehl, *Army’s Report Faults General in Prison Abuse*, N.Y. TIMES, May 18, 2004, at A1, A11. (continued...)

inconsistency is at least partially to blame for the confusion with respect to the permissibility of harsh interrogation techniques in detention facilities in Iraq. It has recently been reported that the Administration considers non-Iraqi detainees to be excluded from the status of “protected persons.”²⁰

GC art. 5 provides some exceptions for the treatment of protected persons deemed security risks²¹:

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.²²

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

GC art. 143, providing that the delegates of the Protecting Power or ICRC are to have unlimited access to prisoner of war camps and internment facilities for interviewing protected persons, also contains an exception for security. The Detaining Power may prevent such visits for reasons of “imperative military necessity,” but only as an “exceptional and temporary measure.” It is apparently

¹⁹ (...continued)

TIMES, August 27, 2004, at A1; Human Rights Watch, *The Road to Abu Ghraib*, June 2004, available at [<http://www.hrw.org/reports/2004/usa0604/usa0604.pdf>].

²⁰ Douglas Jehl, *U.S. Action Bars Right of Some Captured In Iraq*, NY TIMES, Oct. 26, 2004.

²¹ Most prisoners in U.S. custody at Abu Ghraib in Iraq fall into this category. See AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, LTG Anthony R. Jones and MG George R. Fay 11 (2004), available at [<http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>][hereinafter “Fay Report”]. The report explains further:

[A] “Civilian Internee” is someone who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power. Within the confinement facility, however, there were further sub-classifications that were used, to include criminal detainee, security internee, and MI Hold. Security Internee[s] are [c]ivilians interned during conflict or occupation for their own protection or because they pose a threat to the security of coalition forces, or its mission, or are of intelligence value. This includes persons detained for committing offenses (including attempts) against coalition forces (or previous coalition forces), members of the Provisional Government, Non-Government Organizations, state infrastructure, or any person accused of committing war crimes or crimes against humanity. (References omitted).

²² Rights of communication means communication with the outside world, including those defined in articles 25 (correspondence of a personal nature with family members), 30 (visitation by ICRC representatives and other relief organization personnel), 106 (right to notify family of internment), and 107 (right to send and receive mail).

under this exception that ICRC representatives were denied access to some detainees at Abu Ghraib.²³ However, most undocumented “ghost detainees” appear to have been kept from the view of ICRC representatives by the CIA, operating outside military procedures for documenting detainees.²⁴

Nationals of a state that is not a party to the conventions are not “protected persons” under GC, and nationals of neutral or co-belligerent states are not regarded as protected persons “while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”²⁵ It is widely accepted that persons not covered by more favorable provisions of the Geneva Conventions retain protection under Common Article 3 to the Geneva Conventions,²⁶

²³ See Military Intelligence at Abu Ghraib Prison, Hearing before the Senate Armed Services Committee, September 9, 2004, *transcript available at* Westlaw, 2004 WL 2006471 (F.D.C.H.) (testimony of General Paul Kern, Commanding General, United States Army Materiel Command)[hereinafter “Kern Testimony”](stating that ICRC access to eight detainees was denied “under an Article 143 exception, which says for military security purposes you do not have to register them immediately”); Fay Report at 66 (reporting that ICRC delegates had been prevented from interviewing eight detainees in January and March, 2004, for reasons of military necessity under GC art. 143).

²⁴ See Kern Testimony, *supra* note 23. General Kern explained to the House Armed Services Committee that

The Article 143 exception applies primarily when you’re looking at military operations. So if we were to pick up a detainee today and he were a key to an operation which was already being planned, and divulging the fact that we had that individual in detention in an interrogation. . .

Military Intelligence at Abu Ghraib Prison, Hearing before the House of Representatives Armed Services Committee, September 9, 2004, *transcript available at* Westlaw, 2004 WL 2030770 (F.D.C.H.). He also stated that the procedure must be approved by the combatant commander and monitored by the command structure. *Id.* General Fay added that prisoners excepted from Article 143 are documented, but that their identity is not disclosed outwardly. *Id.*

²⁵ GC art. 4. However, the Coalition forces in Iraq have determined that members of the rebel group Mujahedeen-e-Khalq (MEK), an Iranian opposition group designated by the U.S. State Department as a terrorist organization, are to be treated as protected persons within the meaning of the GC. See Department of State News Briefing, July 26, 2004, *available at* Westlaw, 2004 WL 1659373 (F.D.C.H.). State Department Deputy Spokesman J. Adam Ereli explained that the status “relates to their involvement in an activity as belligerents in the conflict between the coalition and Iraq.”

²⁶ The 1949 Geneva Conventions share several types of common provisions. The first three articles of each Convention are identical. Common Article 3, expressly applicable only to conflicts “not of an international nature,” has been described as “a convention within a convention” to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it. See JEAN PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 32 (1975). Originally a compromise between those who wanted to extend the Convention’s protection to all insurgents and rebels and those who wanted to limit it to wars between states, Common Article 3 is now considered to have attained the status of customary international law. See KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 188 (2001). Common Article 3 is now widely considered to embody the minimum set
(continued...)

which prohibits “[o]utrages upon personal dignity, in particular, humiliating and degrading treatment.”²⁷

Such persons may also be protected by article 75 of Additional Protocol I to the Geneva Conventions.²⁸ Article 75 provides that “persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions . . . shall be treated humanely in all circumstances” and that each state party “shall respect the person, honor, convictions and religious practices of all such

²⁶ (...continued)

of rights applicable to persons in international armed conflicts. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 218, 255 (June 27); *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion on Jurisdiction ¶¶ 65-74 (Aug. 10, 1995); JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 692-95, 813-14, 816-17 (2d ed. 2000); *see also* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS 14 (J. Pictet, ed., 1960)[hereinafter “COMMENTARY”] (“This minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built.”). Reciprocity is not considered necessary for its application to a State party. *See id.* at 38 (noting that “the effect on [a State party] of applying Article 3 [in an insurgency] cannot be in any way prejudicial; for no Government can possibly claim that it is ‘entitled’ to make use of torture and other inhuman acts prohibited by the Convention, as a means of combating its enemies”).

²⁷ In pertinent part, Common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949 and Related to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3., *reprinted in* 16 I.L.M. 1391 (“Protocol I”). The United States has not ratified Protocol I, but article 75 is widely considered to be universally binding as customary international law.

persons.” Paragraph 2 of Article 75 prohibits, “at any time and in any place whatsoever, whether committed by civilian or military agents. . . violence to the life, health, or physical or mental well-being of persons, in particular . . . torture of all kinds, whether physical or mental,” “corporal punishment,” and “mutilation”; “outrages upon personal dignity, in particular humiliating and degrading treatment . . . and any form of indecent assault”; as well as “threats to commit any of the foregoing acts.”

Responsibility for Breaches. The proper treatment of prisoners is the responsibility of the detaining power and the individuals directly responsible for their conditions.²⁹ Mistreatment of prisoners of war may incur individual liability under both international norms and the Uniform Code of Military Justice (UCMJ) and may amount to “grave breaches” under the Geneva Conventions. Grave breaches under the GPW include “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial “ in connection with an armed conflict. (GPW art. 130).³⁰ Grave breaches under the GC include “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, . . . or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention . . .”). (GC art. 147).

The Geneva Conventions obligate detaining powers to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed” grave breaches, and to “search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.” (GPW art. 129). In addition to the foregoing penal provisions for grave breaches, Article 129 directs each party to take measures to suppress all violative acts short of grave breaches. Article 127 obligates parties to instruct their people, in particular members of the military, about the requirements of the GPW. Article 127 provides further that “[a]ny military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.” Detainees have the right to protest their treatment to the

²⁹ GPW art. 12 addresses the strict State responsibility of a Detaining Power:

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

³⁰ “Grave breaches” may also include “serious breaches” listed under art. 13, GPW. *See* LEVIE, *supra* note 8, at 352 (noting that the French version of the treaty text uses the same term in both articles 13 and 130). Some authors distinguish “torture” from other forms of maltreatment in that its purpose is to elicit a confession or information. *Id.* at 357-58 (arguing that, to the contrary, “torture inflicted as punishment, out of sheer sadism, or . . . to ‘convert’ an adamant prisoner of war to the Detaining Power’s political ideology” or even torture without motive should be considered a grave breach).

detaining power or to a neutral power or organization serving as the protecting power (ordinarily the International Committee of the Red Cross) (GPW art. 78).

U.S. Military Implementation. U.S. Implementation of the Geneva Conventions with respect to prisoners is found primarily in United States Army Regulation (AR) 190-8.³¹ AR 190-8 prescribes the rules for the treatment of enemy prisoners of war (EPW), retained personnel (RP — medical personnel, chaplains, and Red Cross representatives), civilian internees (CI), and other detainees (OD — whose status has not yet been determined but who are to be treated as EPW in the meantime), who are in the custody of the U.S. Armed Forces. Paragraph 1-5 of AR 190-8 sets forth the general standards:

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered [in accordance with] due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide

³¹ See also Department of the Army Field Manual 27-10, The Law of Land Warfare (1956) [hereinafter “FM 27-10”].

area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

e. A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Convention, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.

...

War Crimes Act. War crimes committed by persons not subject to the UCMJ may be prosecuted in federal court under the War Crimes Act of 1996.³² Under that statute, war crimes committed by or against U.S. nationals are punishable by fine or imprisonment, and a war crime that results in the death of a victim, is subject to the death penalty. (18 U.S.C. § 2441 (a-b)). War crimes are defined to include grave breaches under the Geneva Conventions and violations of Common Article 3.³³ (18 U.S.C. § 2441 (c)(1-3)).

Universal Declaration of Human Rights (UDHR)

The United Nations has a duty under its Charter to the promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”³⁴ The U.N. Charter obligates U.N. member states to take joint and separate action to promote human rights and fundamental freedoms for all persons without distinction as to race, sex, language or religion.³⁵ The United Nations General Assembly adopted the UDHR in 1948 to codify those human rights and fundamental freedoms referred to in the U.N. Charter.³⁶ The UDHR prohibits arbitrary arrest, detention or exile,³⁷ as well as torture and cruel, inhuman or degrading treatment or punishment.³⁸ Although it is a General Assembly Resolution rather than a treaty, and is therefore technically non-binding,

³² P.L. 104-192, 110 Stat. 2104 (1996), *codified at* 18 U.S.C. §§ 2441 *et seq.*

³³ *Supra* note 14.

³⁴ U.N. Charter art. 55.

³⁵ *Id.* art. 56.

³⁶ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

³⁷ *Id.* art 9. The United States has taken the position that the prohibition against arbitrary detention exists as a norm under customary international law. *See* RICHARD B. LILICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE* 136 (3d ed. 1995) (citing Memorial of the United States, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Pleadings 182 n.36 (Jan. 12, 1980)).

³⁸ UDHR art. 5.

some if not most provisions are considered to be customary law.³⁹ The UDHR does not contain an enforcement mechanism.

International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights was adopted by the United Nations to set forth in greater detail the Universal Declaration of Human Rights. The ICCPR prohibits arbitrary detention⁴⁰ and “cruel, inhuman or degrading treatment.”⁴¹ Article 10 provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Article 4 provides for derogation “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . . to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” However, no derogation is permitted from certain rules, including articles 6 (pertaining to the death sentence), 7 (prohibiting cruel, inhuman or degrading treatment), 8 (paragraphs 1 and 2 — prohibiting slavery and servitude), 15 (prohibiting retroactive penal sanctions), and 16 (providing all persons are to be recognized as such by the law).

The United States ratified the ICCPR in 1992, subject to a number of reservations, understandings and declarations, including a declaration that the ICCPR is non-self-executing — that is, it does not give rise to a private action in court. The United States notified the UN that it interprets “cruel, inhuman or degrading treatment or punishment” to mean the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution. President Clinton established the Interagency Working Group on Human Rights Treaties to implement the ICCPR and other human rights treaties⁴² with the mandate to “provide guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters.”⁴³ In 2001, the responsibilities of the Working Group were transferred to the newly created National Security Council (NSC) Policy Coordination Committee (PCC) on Democracy, Human Rights, and International

³⁹ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 82 (1989).

⁴⁰ See International Covenant on Civil and Political Rights, art. 9(1), 999 U.N.T.S. 171 (1966) [hereinafter ICCPR] (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”)

⁴¹ *Id.* art. 7.

⁴² Exec. Order 13,107, 63 Fed. Reg. 68991 (Dec. 10, 1998).

⁴³ *Id.* § 4. The Order also outlined responsibilities of executive departments and agencies in compliance with obligations under human rights treaties. *Id.* § 2.

Operations.⁴⁴ The United States has not officially proclaimed an emergency or named measures that would derogate from the ICCPR.

U.N. Convention Against Torture (CAT)

In 1994, the United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).⁴⁵ CAT requires parties to take measures to prevent torture from occurring within any territory under their respective jurisdictions, regardless of the existence of “exceptional circumstances,” such as a war or threat of war, internal political instability or other public emergency.⁴⁶ CAT defines torture as

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁴⁷

Torture does not include “pain or suffering arising only from, inherent in or incidental to lawful sanctions.” Nor does it include conduct that unintentionally causes severe pain and suffering.

⁴⁴ National Security Presidential Directive 1 (NSPD-1), February 13, 2001.

⁴⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter “CAT”]. The United States submitted a notification to the U.N. Secretary General stating that “... nothing in [CAT] requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.” Additionally, the United States declared that, “pursuant to article 21, paragraph 1, of [CAT], that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above-mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.” Senate ratification was made subject to the reservation that “the United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” For an analysis of the application of CAT to interrogation methods, see CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

⁴⁶ *Id.* art. 2.

⁴⁷ *Id.* art. 1.

CAT obligates its parties to proscribe and punish acts of torture under their criminal laws, including any attempt to commit torture or any act that constitutes complicity to torture.⁴⁸ Additionally, member States are to make the crime of torture an extraditable offense under their domestic laws, if necessary under their laws pertaining to extradition.⁴⁹ States parties also undertake to provide necessary training to prevent torture and “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture” to “law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment,”⁵⁰ and to “keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”⁵¹ Statements induced by torture are not to be admitted as evidence in a criminal proceeding against the victim.⁵² Victims have a right, under the CAT, to have their allegations investigated by impartial officers and to pursue means of redress that afford fair and adequate compensation to the victim or the victim’s heirs.⁵³

U.S. Implementation of CAT. Congress passed legislation in 1994 to implement the requirements of the CAT (18 U.S.C. § 2340 *et seq.*). Section 2340, along the lines of the CAT, defines torture in subsection (1) as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” “Severe mental pain or suffering” means the prolonged mental harm caused by or resulting from the infliction or threat to inflict severe physical pain or suffering; the use or threat to use “mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality”; threats of imminent death; and threats to inflict the above forms of abuse on third persons. (18 U.S.C. § 2340). Persons who commit violations outside the United States⁵⁴ are subject to fine or imprisonment for not more than 20 years, or both, and if death results, violators may receive up to life in prison or the death penalty. (18 U.S.C. § 2340A). Those convicted of conspiracy

⁴⁸ CAT art. 4.

⁴⁹ *Id.* art. 8.

⁵⁰ *Id.* art. 10.

⁵¹ *Id.* art. 11.

⁵² *Id.* art 15.

⁵³ *Id.* arts. 13-14.

⁵⁴ The definition of the “United States” now means “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.” 18 U.S.C. § 2340(3) (as amended by sec. 1089 of P.L. 108-375). Previously, the “United States” also included the Special Maritime and Territorial Jurisdiction of the United States as defined in 18 U.S.C. § 7 and aircraft jurisdiction defined in 49 U.S.C. § 46501(2). The amendment means that places such as military bases and consulates overseas will no longer be excluded from the coverage of the torture statute.

to commit torture may be punished to the same extent as violators themselves, except that they are not eligible to receive the death penalty. (18 U.S.C. § 2340A(c)).

Torture Victim Protection Act (TVPA). In 1990, Congress enacted the Torture Victim Protection Act (TVPA)⁵⁵ to provide an avenue of redress for victims of torture overseas. The TVPA created a cause of action for any person to seek recovery for acts of torture committed under color of foreign law from an individual responsible for the acts who can be “found” within the United States for the purpose of serving process.⁵⁶ Only individuals with a certain level of personal responsibility may be sued under the TVPA; other entities are not amenable to suit. Persons acting as U.S. officials may not be sued under the TVPA, but it may be possible for abused prisoners to bring suit against them under the Alien Tort Statute.⁵⁷

Accountability for Violations

It was established during the Nuremberg Tribunals after World War II that persons who commit war crimes or crimes against humanity may be held individually accountable, whether they are members of the military or civilians.⁵⁸

Military Personnel

Members of the armed forces are directly subject to the laws of war and may be tried by international or national tribunals for violations. Military personnel stationed overseas are also subject to the domestic law of the country where they are stationed, ordinarily under the terms of a status of forces agreement (SOFA) with the host country. Under current law, U.S. service members are not subject to legal process in the Iraqi courts unless the government waives their immunity.⁵⁹

International Law. Members of the armed forces of a party to an international armed conflict may be held individually liable for breaches of the law of war, including for maltreatment of prisoners under their control, whether such prisoners are under their immediate control or indirect control through the chain of

⁵⁵ 28 U.S.C. § 1350 note.

⁵⁶ *Id.*

⁵⁷ 28 U.S.C. § 1350; *see* CRS Report RL32118, *The Alien Tort Statute: Legislative History and Executive Branch Views*, by Jennifer K. Elsea.

⁵⁸ LEVIE, *supra* note 8, at 386-87 (noting, however, a Department of Justice opinion that “only persons exercising governmental authority ordinarily would be in a position to commit grave breaches against protected persons. . .”).

⁵⁹ Under CPA Order 17, Status of the CPA, MNFI, Certain Missions and Personnel in Iraq, 27 June 2004, *available at* [http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf] (last visited Oct. 4, 2004), Coalition forces are immune from Iraqi legal processes for their conduct during the period the Multinational Force remains in Iraq, unless the Iraqi transitional government rescinds or amends the order. *See* CRS Report RS21820, *Iraq: Transition to Sovereignty*, by Kenneth Katzman and Jennifer Elsea.

command. It is not a defense against a charge of any grave breach of the Geneva Conventions that an accused was merely following orders,⁶⁰ although such circumstances may mitigate liability. Commanders may be held vicariously liable for abuses committed by persons under their command even where no orders were issued, if it can be proven that the commander knew or should have known that such abuses were taking place.⁶¹

U.S. Military Law. Service members are subject to military jurisdiction under the Uniform Code of Military Justice (UCMJ). They may be tried for serious crimes by general court-martial, and for less serious crimes by summary court-martial or special court-martial. Service members may also receive administrative sanctions or non-judicial punishment.

The mistreatment of prisoners may be punishable as a crime under article 93, UCMJ, which forbids “cruelty toward, or oppression or maltreatment of, any person subject to [the] orders [or the accused]. . . .”⁶² Article 97 prohibits the arrest or detention of any person except as provided by law.⁶³ The UCMJ also punishes ordinary crimes against persons such as assault and assault consummated by a

⁶⁰ See FM 27-10, *supra* note 18, at para. 509, stating that

a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.

⁶¹ See LEVIE, *supra* note 8, at 390-91 (citing the *Yamashita* case, 327 U.S. 1 (1946), stating that it was generally followed in post-World War II tribunals).

⁶² 10 U.S.C. § 893.

⁶³ 10 U.S.C. § 897.

battery,⁶⁴ assault with intent to commit rape,⁶⁵ rape,⁶⁶ sodomy,⁶⁷ indecent assault,⁶⁸ murder,⁶⁹ manslaughter⁷⁰ and maiming.⁷¹ Article 134, UCMJ, also punishes, “[t]hough not specifically mentioned in [the UCMJ], all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to [the UCMJ] may be guilty. . . .”⁷² Attempts, conspiracy, and solicitation to commit a crime are also punishable.⁷³

U.S. Federal Law. U.S. service members are also subject to federal statutes and may be tried in federal court to the same extent as civilians. Ordinarily, soldiers who are accused of committing a crime overseas would be prosecuted by court-martial, and would be protected by the Double Jeopardy Clause⁷⁴ from being prosecuted in federal court for the same crime. Soldiers accused of participating in criminal activity with civilians who are covered by the Military Extraterritorial Jurisdiction Act (MEJA) may also be tried in federal court.⁷⁵ Former service members who committed crimes overseas prior to their separation from military service may also be prosecuted under MEJA.

Civilian Contractors

International Law. The status of contract personnel that serve as part of an occupying or peacekeeping force falls into a grey area. While civilians accompanying the armed forces in the field are generally entitled to treatment as prisoners of war if captured by an enemy State, they are considered non-combatants who are not authorized to take part in hostilities. To the extent that they carry out military functions in support of U.S. forces, they are liable under international law if they commit war crimes.⁷⁶ In particular, their acts could amount to “grave

⁶⁴ 10 U.S.C. § 928.

⁶⁵ 10 U.S.C. § 934.

⁶⁶ 10 U.S.C. § 920.

⁶⁷ 10 U.S.C. § 925.

⁶⁸ 10 U.S.C. § 934.

⁶⁹ 10 U.S.C. § 918

⁷⁰ 10 U.S.C. § 919.

⁷¹ 10 U.S.C. § 924.

⁷² 10 U.S.C. § 934.

⁷³ 10 U.S.C. §§ 880-882.

⁷⁴ U.S. CONST. amend V; *see* *Wade v. Hunter*, 336 U.S. 684 (1949).

⁷⁵ 18 U.S.C. § 3261 *et seq.* *See infra* note 65 and accompanying text.

⁷⁶ *See* FM 27-10, *supra* note 18, at para. 499 (defining “war crime” as “the technical expression for a violation of the law of war by any person or persons, military or civilian”); LEVIE, *supra* note 8, at 386-87.

breaches” under the Geneva Conventions, giving rise to both personal liability and state responsibility attributable to the United States.

U.S. Federal Law. U.S. contractor personnel and other U.S. civilian employees in Iraq are subject to prosecution in U.S. courts under a number of circumstances. Jurisdiction of federal statutes extends to U.S. nationals at U.S. facilities overseas.⁷⁷ In addition, many federal statutes prescribe criminal sanctions for offenses committed by or against U.S. nationals overseas,⁷⁸ including the War Crimes Act of 1996.⁷⁹ The federal prohibition on torture, 18 U.S.C. § 2340 *et seq.*, applies to acts outside the United States regardless of the nationality of the perpetrator (non-U.S. nationals need only be “found” in the United States to be prosecuted).⁸⁰

Additionally, persons who are “employed by or accompanying the armed forces” overseas may be prosecuted under the Military Extraterritorial Jurisdiction Act (MEJA) of 2000⁸¹ for any offense that would be punishable by imprisonment for more than one year if committed within the special maritime and territorial jurisdiction of the United States. (18 U.S.C. § 3267). Persons “[e]mployed by the armed forces” is defined to include civilian employees of the Department of Defense (DoD) as well as DoD contractors and their employees (including subcontractors at any tier). (18 U.S.C. § 3267 (1)(A)). The National Defense Authorization Act for FY2005 (P.L. 108-375) § 1088, enacted October 28, 2004, expanded the coverage of MEJA over civilian contractors and employees from other federal agencies and “any provisional authority” (e.g., the CPA), to the extent that their employment is related to the support of the DoD mission overseas. The amended language will clarify that contract employees like those working alongside military personnel in Abu Ghraib are covered, irrespective of which agency administers the contract in question. However, it does not cover civilian and contract employees of agencies engaged in their own operations overseas. Courts may be confronted with the question of what constitutes a DoD mission overseas, as opposed, perhaps, to a diplomatic or intelligence mission of some other agency. Whether jurisdiction is

⁷⁷ 18 U.S.C. § 7 (as amended by the § 804 of the USA PATRIOT Act, P.L. 107-56, title VIII, Oct. 26, 2001, 115 Stat. 377) defines “special maritime and territorial jurisdiction of the United States” to include:

- (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and
- (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

18 U.S.C. § 7(9) (excluding persons covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 (*see infra* note 65 and accompanying text.)).

⁷⁸ *See* CRS Report 94-166, *Extraterritorial Application of American Criminal Law*, by Charles Doyle.

⁷⁹ *See supra* note 19 and accompanying text.

⁸⁰ *Supra* p. 11 (discussion of U.S. implementation of CAT).

⁸¹ P.L. 106-523, 114 Stat. 2488 (2000), *codified at* 18 U.S.C. § 3261 *et seq.*

expanded retroactively may also become an issue in some cases. In February, 2004, the Department of Defense issued proposed regulations for implementing MEJA, but those rules never went into effect and will likely need to be adjusted for the new scope of the law.⁸²

Military Law. It is less clear whether contract personnel are amenable to military prosecution under the UCMJ for conduct that took place in Iraq. Article 2(a)(10), UCMJ, extends military jurisdiction, in “time of war,” to “persons serving with or accompanying an armed force in the field.” As a reflection of the constitutional issues that arise whenever civilians are tried in military tribunals, recognized by the Supreme Court in *Reid v. Covert*,⁸³ courts later interpreted the term “war” to mean only wars declared by Congress.⁸⁴ However, the *Reid* Court distinguished the case at issue from *Madsen v. Kinsella*,⁸⁵ in which a military spouse was tried by military commission in occupied Europe, on the basis that

[that case] concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with Army or not.⁸⁶

If *Madsen* remains valid, if and for so long as the United States is considered an “occupying power” in Iraq, it may be acceptable under the Constitution to subject contractors there to military jurisdiction. Additionally, if offenses by contract personnel can be characterized as violations of the law of war, the UCMJ may extend jurisdiction to try suspects by court-martial⁸⁷ or by military commission.⁸⁸ However,

⁸² 69 Fed. Reg. 4,890 (Feb. 2, 2004).

⁸³ See *Reid v. Covert*, 354 U.S. 1 (1957) (overturning two cases involving civilian spouses convicted at courts-martial, pursuant UCMJ Art. 2(10) as “persons accompanying the armed forces,” for the murders of their military spouses at overseas bases); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (civilian employee could not be tried by court-martial for conduct overseas).

⁸⁴ See *Robb v. U. S.*, 456 F.2d 768 (Ct.Cl. 1972); *U.S. v. Averette*, 41 C.M.R. 363 (1970); see also *Latney v. Ignatious*, 416 F.2d 821 (D.C. Cir. 1969) (finding that even if the Vietnam conflict constituted a “war” within the meaning of the UCMJ, conduct must be intimately connected to military in order for jurisdiction under Art. 2(10) to apply).

⁸⁵ 343 U.S. 341 (1952) (upholding the trial of civilian by military commission for non-military crime in occupied territory). Jurisdiction in *Madsen* was found in Article 15 of the Articles of War (substantially identical to 10 U.S.C. § 821, *infra* note 71). 343 U.S. at 350-55 (holding that the “law of war” includes “that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government”).

⁸⁶ 354 U.S. at 35, & n 10.

⁸⁷ See 10 U.S.C. § 818 (providing jurisdiction over “any person who by the law of war is subject to trial by military tribunal”).

⁸⁸ See 10 U.S.C. § 821 (preserving “concurrent jurisdiction with respect to offenders or (continued...)”).

the validity of *Madsen* may have been undermined for the purposes of operations in Iraq by later case law requiring a congressional declaration of war and otherwise limiting military jurisdiction over civilians.⁸⁹

Iraqi Government Authority over Contractors. Contractors to U.S. agencies or any of the multinational forces or diplomatic entities in Iraq operate under the law of the interim government in Iraq, which includes orders issued by the CPA prior to the hand-over of sovereignty to the Iraqi Interim Government.⁹⁰ Under CPA Order Number 17, as revised June 27, 2004, contractors are exempt from Iraqi laws for acts related to their contracts.⁹¹ That order provides that “[c]ontractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts. . . ,” but that they are subject to all relevant regulations with respect to any other business they conduct in Iraq (section 4(2)). Contractors are also immune from Iraqi legal processes for acts performed under the contracts (section 4(3)). Iraqi legal processes could commence against contract personnel without the written permission of the Sending State, but that State’s certification as to whether conduct at issue in a legal proceeding was related to the terms and conditions of the relevant contract serves as conclusive evidence of that fact in Iraqi courts (section 4(7)).

Redress

In addition to criminal punishment of those responsible for torture, there may also be a legal right to compensation for the victims. This section briefly summarizes international law regarding the right to compensation in cases involving breaches of international law, followed by a discussion of available means under U.S. law.

⁸⁸ (...continued)

offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals”); *cf Ex Parte Quirin*, 317 U.S. 1 (1942).

⁸⁹ *See, e.g.,* *Duncan v. Kahanamoku*, 327 U.S. 304 (1945)(military tribunal had no jurisdiction over civilians for non-military crimes where martial law was in operation but courts could function); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (holding that an honorably discharged former soldier could not be tried by court-martial for a crime he allegedly committed while stationed overseas); *Reid v. Covert*, 354 U.S. 1 (1957) (setting aside the military conviction of a civilian dependant of a service member stationed overseas); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (voiding the conviction by court-martial of a military wife charged with involuntary manslaughter); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960)(holding that civilian employees of the military may not be tried by court-martial, even for crimes committed overseas).

⁹⁰ The Coalition Provisional Authority dissolved at the end of June, 2004, but orders issued by the CPA remain in place unless rescinded by the Iraqi Transitional Government, as modified by CPA Order 100. For more information on the transfer of sovereignty, see CRS Report RS21820, *Iraq: Transition to Sovereignty*, by Kenneth Katzman and Jennifer Elsea.

⁹¹ Order 17, Status of the CPA, MNFI, Certain Missions and Personnel in Iraq, 27 June 2004, *available at* [http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf] (last visited Oct. 4, 2004).

State Responsibility

Conduct that violates international obligations is attributable to a State if it is committed by the government of the State or any of its political subdivisions, or by any official, employee, or agent operating within the scope of authority of any of these governments, or under color of such authority.⁹² Principles of State responsibility require a State in breach of an obligation to another State or international organization, without justification or excuse under international law, to terminate the violation and provide redress.⁹³

The matter of reparations for war crimes is ordinarily something that is negotiated through a peace treaty at the end of the armed conflict. Reparations may take the form of monetary compensation for the damages caused by the violation, but they may also take such forms as restitution in kind, restoration of the *status quo ante*, or specific performance of an undertaking.⁹⁴ It is possible that the respective governments may reach an agreement for some type of reparation, and yet the individual victims are not guaranteed any compensation at all.⁹⁵

The primary remedy for a breach of State responsibility with respect to the maltreatment of detainees appears to be the payment of reparations. The Red Cross commentary on the GPW states that

[c]ompensation for damage resulting from the unlawful act, although not stipulated explicitly, is undoubtedly implied by the authors of Article 12. Consequently, a State which bears responsibility for a violation of the Convention is in duty bound to make good the damage caused, either by restoring everything to the former condition . . . or by paying damages, the choice resting, as a general rule, with the injured party. In many cases, however, reparation will have to be limited to the payment of damages, when the nature of the prejudice caused makes restoration impossible. An example of this would be the physical and mental injury suffered by prisoners . . .⁹⁶

Even though compensation may be contemplated, however, an individual who is harmed may not be able to seek redress directly, particularly when, as under the Convention, no private right of action expressly is granted. Under traditional international practice, the State of an individual's nationality is regarded as having suffered the harm when an international agreement is breached, and it is up to that State alone to press for reparation. However, international law may be changing in that regard. For example, the Rome Statute of the International Criminal Court

⁹² AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Vol II (1987), § 207.

⁹³ *Id.* at § 901, comment a.

⁹⁴ *Id.* at comment d.

⁹⁵ *Cf* *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) (“Final settlement between sovereigns does release the defendant sovereign from further liability.”).

⁹⁶ *See* COMMENTARY, *supra* note 13, at 130.

provides for the compensation of victims of international crimes out of a trust fund.⁹⁷

In the aftermath of Iraq's occupation of Kuwait, the U.N. Security Council set up a compensation commission to adjudicate claims submitted by victims of war crimes through their respective home countries.

U.S. Provisions for Compensation

As a general rule, the United States may not be sued in its own courts unless it has waived its sovereign immunity.⁹⁸ Congress has provided a waiver for certain types of claims through the Federal Tort Claims Act (FTCA),⁹⁹ but it does not include tort claims involving injuries that occurred overseas.¹⁰⁰ Victims may also be able to sue for damages in U.S. courts, for example, under the Alien Tort Statute or the Torture Victim Protection Act.¹⁰¹ Congress may provide for compensation without waiving U.S. sovereign immunity through administrative procedures, and has done so in several instances.¹⁰²

The Military Claims Act. Persons injured by U.S. military officials may seek compensation under the Military Claims Act, 10 U.S.C. § 2733. The MCA compensates for personal injury, death, or property damage caused by military personnel or civilian employees acting within the scope of their employment or by “noncombatant activities of a peculiarly military nature.” The Secretaries of the military departments prescribe regulations setting forth the circumstances under which claims will be paid.¹⁰³ A claimant may appeal to the JAG, but there is no right to sue the United States in federal court if the military department involved denies the claim.

⁹⁷ See Rome Statute of the International Criminal Court art. 79, U.N. Doc. A/CONF.183/9 (1998) (“Rome Statute”). The United States is not a party to the Rome Statute, but participated in its drafting. See CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer Elsea. The inclusion of a provision for compensation arguably shows some evidence of an emerging individual right to redress.

⁹⁸ *Federal Housing Administration v. Burr*, 309 U.S. 242, 244 (1940).

⁹⁹ 28 U.S.C. §§ 1346(b), 2671-2680. For an overview, see CRS Report 95-717, *Federal Tort Claims Act: Current Legislative and Judicial Issues*, by Henry Cohen.

¹⁰⁰ 28 U.S.C. § 2680(k); *Sosa v. Alvarez-Machain*, ___ U.S. ___ (2004) (holding that “the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”).

¹⁰¹ See *supra* note 43; see, e.g. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). Because neither of these statutes waives U.S. sovereign immunity, lawsuits against the U.S. government or its employees would not likely succeed under them. However, personnel who cause injuries but are found to be acting outside the scope of their employment may be held personally liable. Whether a contract employee is considered a “federal employee” depends on the nature of the government’s control over such contract employees.

¹⁰² Civil Liberties Act of 1988, P.L. 100-383, 102 Stat. 903 (codified as amended at 50 U.S.C. App. §§ 1989-1989d (2000)) (compensation for Japanese-American WWII internees); see Eric A. Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689 (2003) (listing other examples).

¹⁰³ The Army regulations may be found at 32 CFR part 536.

Compensation under the MCA is generally limited to \$100,000. Claims for personal injury or death may include items such as medical expenses, lost earnings, diminished earning capacity, pain and suffering, and permanent disability. Ordinarily, the law of the locale where the injuries occurred is applied. Enemy nationals, as well as nationals of an ally of a country at war with the United States, are ineligible for relief under the MCA unless the individual claimant is determined to be friendly to the United States.

The Foreign Claims Act. Inhabitants of foreign countries who are injured by military personnel or incidental to noncombat activities of the U.S. military may be compensated for injury, death, or property damage under the Foreign Claims Act (FCA), 10 U.S.C. § 2734-2736. The Department of Defense has assigned single-service responsibility for processing claims in Iraq to the Army. All FCA claims are decided by a Foreign Claims Commission, ordinarily consisting of one or three military attorneys appointed by the Senior Judge Advocate in a foreign area of operations.¹⁰⁴ Like the MCA, the FCA relies on local law to determine whether claims are compensable and what level of compensation is appropriate. Where the claimant is a national of a country at war with the United States, compensation is available only if the claimant is determined by the commission or by the local commander to be friendly to the United States. Relief provided under the FCA is considered to be *ex gratia* and does not preclude a recipient from pursuing a court action, but the FCA does not constitute a waiver of sovereign immunity and does not provide a cause of action in court. The United States may pursue subrogation against individual U.S. tortfeasors in order to recoup funds expended.

Role of Congress

Congress has the authority under the Constitution to make rules regarding capture on land or water,¹⁰⁵ to define and punish violations of international law,¹⁰⁶ and to make regulations to govern the armed forces.¹⁰⁷ However, it has not previously taken a very active role in prescribing the treatment of prisoners of war and civilian internees.¹⁰⁸ The following sections summarize the congressional reaction to the Abu Ghraib scandal and legislative proposals to prevent a recurrence.

¹⁰⁴ AR 27-20, chapter 10.

¹⁰⁵ U.S. CONST. art. I, § 8, cl. 11.

¹⁰⁶ *Id.* art. I, § 8, cl. 10.

¹⁰⁷ *Id.* art. I, § 8, cl. 1.

¹⁰⁸ Congress has made some violations of the Geneva Conventions punishable under the War Crimes Act of 1996, 18 U.S.C. §§ 2441 *et seq.* See *supra* note 32 and accompanying text. Congress has provided for the internment of alien enemies on U.S. territory, see Enemy Alien Act, 50 U.S.C. § 21 *et seq.*, but there is no statute authorizing detention of prisoners of war or civilians in occupied territory.

Oversight and Resolutions — 108th Congress

The 108th Congress took up issues related to the Abu Ghraib scandal and the treatment of detainees in numerous committee hearings, and reaffirmed that torture is unlawful. Section 9011 of the Department of Defense Appropriations Act of 2005, P.L. 108-287, states that

Congress, consistent with international and United States law, reaffirms that torture of prisoners of war and detainees is illegal and does not reflect the policies of the United States Government or the values of the people of the United States.

Also during the 108th Congress, the House of Representatives and the Senate each passed resolutions condemning the abuses at Abu Ghraib and calling for investigations.¹⁰⁹ Several House resolutions of inquiry that would have called for the Administration to turn over pictures, film and documents related to the abuse of Iraqi prisoners were reported adversely out of committee and never reached a vote by the full house.¹¹⁰

Hearings. At least five committees — the Senate Armed Services Committee, Senate Select Committee on Intelligence, House Select Committee on Intelligence, House Armed Services Committee, and Senate Foreign Relations Committee — held hearings during the 108th Congress where the Abu Ghraib scandal was discussed. In a series of hearings held in May, 2004, the Armed Services Committees of both houses took testimony from numerous Department of Defense officials, including Secretary of Defense Donald Rumsfeld, General Richard B. Myers, Chairman, Joint Chiefs of Staff; Acting Secretary of the Army Les Brownlee; U.S. Army Chief of Staff General Peter J. Schoomaker; and CENTCOM Deputy Commander Lieutenant General Lance L. Smith. The Committees also interviewed General Taguba, who investigated the MP unit at Abu Ghraib, and Stephen Cambone, Undersecretary of Defense for Intelligence, as well as other intelligence officials. The Senate Armed Services Committee took testimony from CENTCOM Commander General John Abizaid, Lieutenant General Ricardo Sanchez, Commander of the Multinational Force-Iraq; Major General Geoffrey Miller, Deputy Commander for Detainee Operations in Iraq, and Colonel Marc Warren, Army Judge Advocate General.

In July, 2004, the Senate Armed Services Committee interviewed Lieutenant General Paul Mikolashek, Army Inspector General, about the findings of his investigation into the matter. On September 9, the Senate and House Armed Services Committee held hearings to receive testimony from general officers who conducted a formal investigation into the allegations of abuse,¹¹¹ and from James Schlesinger

¹⁰⁹ H.Res. 627; S.Res. 356.

¹¹⁰ H.Rept. 108-547 (2004) (H.Res. 640); H.Rept. 108-631 (2004) (H.Res. 699); H.Rept. 108-658 (2004) (H.Res. 700), H.Rept. 108-632 (2004) (H.Res. 689).

¹¹¹ See Fay Report, *supra* note 21.

and Harold Brown, appointed by the Secretary of Defense to head the Independent Panel to Review DOD Detention Operations.¹¹²

Legislation — 108th Congress

The following laws enacted by the 108th Congress address the treatment of prisoners in Iraq.

National Defense Authorization Act for FY2005, P.L. 108-375. In addition to the jurisdictional modifications described above, Congress addressed the detention issue in the Defense Authorization Act, which was signed into law by the President October 28, 2004. The Senate had included a measure in its version that would have applied to CIA interrogators, as well as intelligence personnel from other agencies, the same rules that apply to the military,¹¹³ but the Administration objected that the provision “would have provided legal protections to foreign prisoners to which they are not now entitled,”¹¹⁴ and the measure was stripped out in conference.¹¹⁵

The National Defense Authorization Act does not specifically prohibit torture or cruel, inhuman or degrading treatment of detainees, as the Senate bill would have provided.¹¹⁶ Instead, it sets forth the sense of the Congress that “the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States,” and that no detainee shall be subject to such treatment.¹¹⁷ Section 1091 states that the policy of the United States is to ensure that no detainee in its custody is subjected to the treatment described above, to promptly investigate and prosecute instances of abuse, to ensure that U.S. personnel understand the applicable standards, to accord detainees whose status is in doubt the protection for prisoners of war under the Geneva Conventions, and to “expeditiously process and, if appropriate, prosecute detainees

¹¹² The Final Report of the Independent Panel to Review Department of Defense Detention Operations is available at [<http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>].

¹¹³ See S. 2845 (Public Print), 108th Cong., § 1014.

¹¹⁴ See Letter from Condaleeza Rice and Josh Bolton, to Representative Hoekstra and Senator Collins (Oct. 18, 2004), available at [<http://www.fas.org/irp/news/2004/10/wh101804.pdf>](last visited May 18, 2005).

¹¹⁵ Douglas Jehl and David Johnston, *White House Fought New Curbs On Interrogations, Officials Say*, NY TIMES, Jan. 13, 2005, at 1.

¹¹⁶ H.R. 4200 (engrossed Senate version) § 1047 would have provided that “[n]o person in the custody or under the physical control of the United States shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.” The enacted version provides nearly identical language, but includes the statement as part of a “sense of the Congress,” which may be viewed as merely hortatory and not binding.

¹¹⁷ National Defense Authorization Act for FY2005 § 1091, P.L. 108-375.

in the custody of the United States, including those in the custody of the United States Armed Forces at Guantanamo Bay, Cuba.”

Required Regulations. Section 1092 requires the military to implement, within 150 days of the passage of the act, a policy to ensure detainees are treated in accordance with the obligations set forth in section 1091. The required DOD regulations are to contain, at a minimum, the following elements:

- (1) Commanding officers of detention and interrogation facilities must educate their troops, including military personnel and civilian contractors, about the Geneva Convention Relative to the Treatment of Prisoners of War.
- (2) DoD contracts in which civilian contract personnel will be required to interact with detainees must include a requirement that such personnel have received training regarding the international obligations and applicable U.S. law.
- (3) Detainees must be informed in their own languages of their rights under the Geneva Convention.
- (4) The Department of Defense must provide for periodic inspections, both announced and unannounced, of detention and interrogation facilities.
- (5) Guard-detainee contact must be same-sex except under exigent circumstances.

The first two requirements of section 1092 codify the GPW, art. 127 requirements that States Parties provide for education in the requirements of the Geneva Conventions, except that it is limited to military personnel and civilian contractors working at detention and interrogation facilities operated under DOD. The third requirement also corresponds to an obligation under the GPW.¹¹⁸ With respect to the fourth requirement, the GPW does not specifically require inspections by the military chain of command. However, subparagraph 3 would provide a means to satisfy the obligation to prevent abuse. The fifth requirement also echoes an obligation under the GPW, at least as the Convention applies to women prisoners.¹¹⁹

Reporting Requirements. Section 1093 of PL 108-375 requires DOD to submit copies of regulations, policies and orders prescribed under section 1092 to the armed services committees of both houses within 30 days after their implementation, along with a report setting forth steps taken to implement section 1092 as of that time.¹²⁰ Section 1093 also requires DOD to submit an annual report giving notice of

¹¹⁸ See GPW art. 41 (requiring text of the GPW, as well as its Annexes and any other special agreement reached by belligerent parties, and all regulations related to the conduct of prisoner of war, to be posted, in the prisoners’ own language, in places in the camp where all prisoners can read them).

¹¹⁹ See *id.* art. 97 (“Women prisoners shall be confined separately and under the supervision of women.”). No specific language precludes men from being in custody under female supervision, but it may have been presumed that most guards would be men.

¹²⁰ The Army announced new procedures for handling detainees in all theaters of operation (continued...)

any investigation into any violation of laws regarding the treatment of detainees, as long as ongoing criminal or administrative actions are not compromised through such notice. Further, the report will contain aggregate data relating to the detention operations of the Department of Defense, including how many persons are held and in what status, and how many have been transferred to the jurisdiction of other countries.

Section 1206 requires DOD to submit a report on contractors supporting deployed forces and reconstruction efforts in Iraq, including a description of the overall chain of command and oversight mechanisms to ensure adequate command and supervision and an explanation of their legal status after the transfer of sovereignty in Iraq. The report is to be submitted within 180 days of the enactment of P.L. 108-375, and will include a description of sanctions that may be imposed in case of misconduct, a list of actions taken against contractor personnel as of the date of the initiation of military operations in Iraq, May 1, 2003.

Prohibition on Funds to Justify Torture. Congress included in the Consolidated Appropriations Act for FY2005, P.L. 108-447, a prohibition on the use of funds by the Justice Department to “be used in any way to support or justify the use of torture by any official or contract employee of the United States Government.” (Sec. 632).

Issues for the 109th Congress

As investigations continue into U.S. detention operations outside the United States, calls for further congressional action and for more rigorous investigation will likely continue.¹²¹

Hearings. The Senate Judiciary Committee held hearings June 15, 2005, on the subject of Detainees. The Senate Armed Services Committee, Subcommittee on Personnel, held hearings July 14, 2005 on Detention Policies and Military Justice. On that same day, the House Permanent Select Committee on Intelligence held a hearing entitled “Critical Need for Interrogation in the Global War on Terror.” The Armed Services Committee of the House of Representatives held hearings June 29, 2005, entitled “Detainee Operations at Guantanamo Bay.” Detainee operations were also discussed during nominations hearings, including the nomination of Attorney General Alberto Gonzales and the nomination of General Peter Pace for the position of Chairman of the Joint Chiefs of Staff.

¹²⁰ (...continued)

in February, 2005. See Kathleen T. Rhem, *DefenseLINK News: Army Improving Procedures for Handling Detainees*, AMERICAN FORCES PRESS SERVICE, Feb. 24, 2005, available at [http://www.defenselink.mil/news/Feb2005/n02242005_2005022407.html] (last visited Sep. 25, 2005).

¹²¹ See, e.g., Human Rights Watch, *World Report: 2005* (Jan. 13, 2005)(urging the creation of a fully “independent investigative commission” to investigate U.S. detention and interrogation operations), available at [<http://hrw.org/wr2k5/>](last visited Jan. 14, 2005).

Legislation. The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (P.L. 109-13), enacted into law May 11, 2005, contains a prohibition on the use of funds appropriated by that act “to subject any person in the custody or under the physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.” (Sec. 1031). The prohibited treatment is defined to coincide with the statutory definition of torture and the Senate declaration that accompanied the ratification of CAT, which defined “cruel, unusual, and inhumane treatment or punishment” as actions that are prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution. However, with respect to cruel, unusual and inhumane treatment, the Administration has taken the position that neither the Constitution nor CAT, as implemented by the United States, applies to aliens held overseas.¹²² It is thus unclear whether section 1031 will be interpreted to impose any new restrictions on Defense spending.

Two bills would create an independent commission to investigate detainee abuse (H.R. 3003, S. 12 § 224). The House of Representatives passed a provision as part of its Defense Authorization bill for FY2006, H.R. 2863, that would “reaffirm[] that torture of prisoners of war and detainees is illegal and does not reflect the policies of the United States Government or the values of the people of the United States.” (Sec. 9009).

H.R. 112 would require detainee interrogations, whether conducted by military or civilian personnel (including contractors), to be videotaped. The resulting videotapes could be classified, but would be available to any party in any military or civilian criminal proceeding, if relevant, under seal if appropriate. The bill would also require that immediate and unfettered access to detainees be accorded to representatives of the International Committee of the Red Cross, the UN High Commissioner for Human Rights, and the UN Special Rapporteur on Torture.

The Senate Defense Authorization bill (S. 1042) contains a section that would require the Secretary of Defense to establish a DoD policy with respect to the role of military medical and behavioral science personnel in the interrogation of detainees. (Sec. 1071). The Senate is also considering amendments to that bill to require the Defense Department to adhere to the Army’s interrogation manual (SA 1557), to prohibit cruel, inhumane and degrading treatment of prisoners in U.S. custody no matter where they are held (SA 1556), to authorize the Combatant Status Review Tribunals to determine detainees’ status (SA 1505), and to establish an independent commission to investigate detainee abuse (SA 1494).¹²³ After the White House reportedly threatened to veto the bill if it includes measures that would impede the President’s ability to conduct the war on terrorism,¹²⁴ the bill was returned to committee and further action on it was postponed.

¹²² See Letter from Assistant Attorney General William Moschella to Senator Patrick Leahy, April 4, 2005, *available at* [<http://www.scotusblog.com/>](last visited May 18, 2005).

¹²³ 151 CONG. REC. S8833 *et seq.* (daily ed. July 25, 2005).

¹²⁴ Liz Sidoti, *Senators Press Bill On Detainee Rights*, PHILADELPHIA INQUIRER, July 26, 2005, at 1.

The Senate version of the Defense Department FY2006 Appropriations bill (H.R. 2863) contains a provision, introduced as an amendment by Senator McCain, that would prohibit the “cruel, inhuman and degrading treatment” of detainees.¹²⁵ Section 8154 of the bill, as amended, would limit interrogation techniques used by the Department of Defense to those defined in U.S. Army Field Manual (FM) 34-52, Intelligence Interrogation¹²⁶ (“FM 34-52”). This requirement would not apply with respect to persons detained under criminal or immigration laws. The provision would not restrict DoD’s authority to revise the regulation, but would require that DoD prescribe uniform interrogation procedures for all detainees in DoD custody who are undergoing interrogation for intelligence purposes.

Section 8155 of H.R. 2863, as passed by the Senate, applies more broadly. It would prohibit the cruel, inhuman, or degrading treatment or punishment of all persons in U.S. custody, regardless of the agency in whose custody the person is held and without geographical limitation. The prohibited treatment is defined as that which would violate the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as the Senate has interpreted “cruel, inhuman, or degrading” treatment banned by the U.N. Convention Against Torture.¹²⁷ The Administration has reportedly sought to have the Central Intelligence Agency excepted from this provision on the grounds that “the president needed maximum flexibility in dealing with the global war on terrorism.”¹²⁸ Senator McCain has criticized the Administration’s proposal, arguing that an express CIA exemption could be interpreted as tantamount to statutory authority for the CIA to subject detainees to the treatment his amendment seeks to ban.¹²⁹

The Targeting Terrorists More Effectively Act of 2005, S. 12, contains a provision to define U.S. policy with respect to detainees in the war against terrorism. Section 223 would express the sense of the Congress that, at a minimum, Common Article 3 of the Geneva Conventions applies to the war. The bill would expressly mandate that “no detainee shall be subject to torture or cruel, inhumane, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.” It would further state that the policy of the United States is to treat all foreign persons in the custody of the United States “humanely and in accordance with the legal obligations under United States law and international law, including the

¹²⁵ SA 1977 to H.R. 2863 (October 5, 2005)(passed with a roll call vote of 90 yeas and 9 nays).

¹²⁶ DEPARTMENT OF THE ARMY FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (1992), available at [<http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf>] (Sep. 1, 2004)[hereinafter FM 34-52]. For an analysis of the approved interrogation procedures, see CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer Elsea.

¹²⁷ See *supra* page 11; CRS Report RL32438; *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

¹²⁸ See Eric Schmitt, *Exception Sought in Detainee Abuse Ban*, N.Y. TIMES, Oct. 25, 2005, at 16.

¹²⁹ See Charlie Savage, *McCain Fights Exception to Torture Ban*, BOSTON GLOBE, Oct. 26, 2005, at A2.

obligations in the Convention Against Torture and in the minimum standards set forth in the Geneva Conventions.” The bill would further proclaim as U.S. policy that “all officials of the United States are bound both in wartime and in peacetime by the legal prohibitions against torture, cruel, inhumane, or degrading treatment set out in the Constitution, laws, and treaties of the United States.”

It may be argued that it is unnecessary for Congress to provide more express prohibitions to enforce executive compliance with what already is the law of the land.¹³⁰ However, a series of documents released by the executive branch that discuss legal aspects of the treatment of detainees in the war on terrorism may be read to suggest that relevant treaties are inoperative with respect to the executive branch unless Congress has enacted specific implementing legislation, or that the President has inherent authority to set aside treaty obligations.¹³¹ As investigations into alleged abuse of detainees at Guantanamo Bay Naval Station continue, the issue of detainee treatment seems likely to continue to draw the attention of Congress.

¹³⁰ See U.S. CONST. art. VI.

¹³¹ See The National Security Archive, *The Interrogation Documents: Debating U.S. Policy and Methods*, available at [<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127>] (last visited Jan. 13, 2005). The Justice Department subsequently retracted a memorandum prepared by the Office of Legal Counsel that discussed the application of 18 USC §§ 2340 *et seq.* (implementing CAT), and issued a new memorandum on the subject that expressly declined to address whether the President is bound by the relevant treaties. See Office of Legal Counsel Memorandum for Deputy Attorney General James B. Comey Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340 - 2340A (Dec. 30, 2004), available at [<http://www.usdoj.gov/olc/dagmemo.pdf>] (last visited Jan. 14, 2005).